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EXTRA TERRITORIAL CRIMINAL JURISDICTION IN BRITISH CANADA

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When the Treaty of Paris, 1783, the Definitive Treaty between Great Britain and the revolting American colonies, divided the territory on the continent of North America, theretofore British, between the mother country and the new republic, there was doubt as to the boundary at some points, but it was clear at others. It was perfectly clear that the parallel of 45° north latitude was the boundary from the Connecticut River west to the River St. Lawrence, and that west from that point the middle line of the Great Lakes and connecting rivers was to be taken.

Britain was in possession of territory south of the 45th parallel, where that was the boundary, and of territory to the right of the Great Lakes and connecting rivers. She had posts at Point au Fer and at Dutchman's Point on Lake Champlain and the territory between these and the 45° parallel had a population practically all of whom were Loyalists and desired to remain under the old flag. Further west, she had Oswegatchie, Oswego, Niagara (on the east of the river), Detroit, Michilimackinac, most of the inhabitants of which were also Loyalists. The United States failed to carry out certain provisions of the treaty, and Britain kept posession of the posts—which the cause and which the effect, or whether the relation of cause and effect existed at all between the two facts, is not of consequence here.

The Province of Quebec had by the Quebec Act (1774), 14 George III, c. 83, been given the territory immediately north of the 45th parallel to the St. Lawrence, thence up the eastern bank of that river to Lake Ontario, through Lake Ontario and the Niagara River, along the right bank of Lake Erie to the western boundary of Pennsylvania, south along this boundary to the Ohio, along the bank of the Ohio to the Mississippi and "northward" to the boundary of the Hudson Bay territory. Quebec, therefore, never had the territory between the 45th parallel and Point au Fer and Dutchman's Farm; nor did she ever have Oswegatchie, Oswego or Niagara; while she lost *de jure* Detroit and Michilimackinac.

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It was not long before a question arose concerning the government of this anomalously situated territory; and it became acute when a soldier of the Twenty-ninth Regiment of Foot murdered another of the Fifty-third and a civilian was murdered by two others near Niagara.

Magistrates on the opposite side of the River Niagara, in admittedly British territory, took cognizance of these two murders, examined witnesses and sent the accused to Montreal for trial early in 1788. At that time the enormous territory, now the Provinces of Ontario and Quebec (and *de facto* much more), was divided into two Districts, that of Quebec coming as far west as the Rivers Godfroy and St. Maurice and that of Montreal including all the remainder (Quebec Ordinance, September 17, 1764).

When the chief justice of the Province, William Smith, found these men in the gaol at Montreal, he issued a writ of *habeas corpus*, and under that writ had the men brought to Quebec, the seat of government.

Lord Dorchester, the Governor, May 5, 1788, wrote an official letter to Brigadier-General Henry Hope, the Lieutenant-Governor, informing him of the facts which had been brought to his attention by the chief justice and asking for the opinion of the Council. The letter proceeds: "If they are to be tried for foreign murders under the Statute of 33 Henry VIII, ch. 23, the Commission must be preceded by the examination it directs and for that purpose I must request you will convene a competent number of the Council for the full and distinct reports which the importance of the subject and their respective cases may require. As they may be followed by a Special Commission of *Oyer and Terminer*, the chief justice's attendance on the preparatory examination may be dispensed with and the Committee can command the aid of Mr. Attorney and Mr. Solicitor-General on all such questions which the law and the ends of public justice may demand."

The Lieutenant-Governor called together a special Committee of the Privy Council at Quebec on Tuesday, May 20, 1788, and there attended the Lieutenant-Governor himself, two judges of the Court of Common Pleas at Quebec (Messrs. Mabane and Dunn), Postmaster-General Finlay and Messrs. Grant, Baby and De St. Ours.

The Lieutenant-Governor read Dorchester's letter and the statute referred to, and it was resolved that it should "first be considered whether the statute . . . authorizes the Committee to proceed to the examination requested" and that "it should be submitted to the attorney-general and the solicitor-general to give their opinions in writing whether the statute is in force in the province and also to call upon

them to attend the Committee on Tuesday morning at 11 o'clock to be heard with their reasons and to give such other information on the subject as the Committee may require" (Can. Arch. Q. 37, p. 224).

The attorney-general, James Monk, and the solicitor-general, Jenkin Williams, delivered their opinions in writing to Hope. They said they had considered the questions submitted to them. The opinion was:

"This question arises upon the two cases now presented to the Governor, to-wit: Alexr. Henry Thompson, a Soldier of His Majesty's 29th Regiment, for the Murder of Isaac Allen, late a Soldier of His Majesty's 53rd Regiment, at Niagara, on the South Side of the River, on Land not within the bounds described by the Quebec Act, 14 Geo. 3d, ch. 83, tho' a territory within His Majesty's Government and Protection, and James Gale for the murder of Nehemiah Street near Niagara aforesaid opinion that Stat. in force and that His Excellency the Governor Keeper of the Great Seal of the Province may legally Issue a Commission of Oyer and Terminer for the Trial of the above Felonies should His Majesty's Council upon Examination into the charges report to His Excellency that there is sufficient Ground to suspect that the said felonies have been committed.

The Crime of Murder being a Felony at Common Law the Statute has given power to try that felony out of the County or Shire where committed, and even when committed without the King's Dominions, try the same within such place as may be directed by a Commission of Oyer and Terminer to be issued for that purpose. The Quebec Act in our opinion by introducing into the Province the Criminal Laws of England and directing the same methods of Prosecution and Trial punishment and forfeitures as are used and directed by the Laws of England has made the Statute of 33d Harry the 8th, Ch. 23, "part of the laws of this Province." The Statute 33 Henry 8, c. 23 was passed in 1541—the Preamble recites inconvenience and expense arising from the practice of sending to "divers Shires and Places of the Realm and other the King's Dominions" for "Persons upon great Grounds of vehement Suspicion as well of High Treason, Petty Treason and Misprisions of Treason as of Murders" to be examined before the King's Council upon their offenses, and notwithstanding such examination, "Such Offenders . . . by the Course of the Common Law of the Realm must be indicted within the Shires or Places wherein they committed their offenses" and there tried by the Inhabitants or Freeholders. It, therefore, enacted "That if any Person or Persons being examined before the King's Council or three of them upon any manner of Treas-

sons, Misprisions of Treasons or Murder do confess such Offenses or that the said Council or three of them upon such Examination shall think any Person so examined to be vehemently suspected of any Treason, Misprisions of Treasons or Murder . . . then . . . His Majesty's Commission of Oyer and Terminer . . . shall be made . . . to such Persons and into such Shires or Places as shall be named by the King's Highness for the speedy Trial, Conviction or Delivery of such Offenders . . ." This Statute was effective over all "the King's Dominions"; and while the Statute of 1554, 1 and 2 Philip and Mary, reinstated the Common Law as to the place of trial when the offense was committed in England, it did not repeal 33 Henry 8, c. 23, where the offense was committed out of England. (See Dyer's Reports, 132, 284; 11 Coke's Reports, 63; 3 Coke's Institutes 27; 1 Anderson's Reports 104.) The Statute of 33 Henry VIII, c. 23, was in full force at the time in question (See Blackstone's Commentaries, Book IV, p. 301) and was not repealed until 1828, 9 George IV, c. 31, s. 1, as to England; 9 George IV, c. 74, s. 125 as to India.

The Colonial Crown Lawyers were of opinion that being in force in England it was also in force in Quebec.

On Tuesday, May 22, the same Members met: Hope read the opinion of the Law Officers of the Crown. Debates arose and the question was put "Is it the opinion of the Committee that they shall proceed to the Examination requested in His Excellency the Governor's letter of reference to them?"

For the Affirmative: Mr. Baby, Mr. Grant, Judge Mabane, Judge Dunn, Mr. Finlay (5).

For the Negative: Mr. De St. Ours, the Lieutenant-Governor (2).

The first paragraph of Dorchester's letter was ordered to be communicated to the Attorney-General "in order that he may take the necessary steps for bringing such Prisoners on Saturday Morning next at 10 o'clock before the Committee of Privy Council for Examination."

The next meeting was on Friday, May 23, when the same members were present. Hope read a draft by the Attorney-General of a Warrant and also a brief Statement prepared by the Attorney-General of the cases to be considered. The warrant was in the name of Henry Hope as Lieutenant-Governor. The Attorney-General was then sent for and gave verbal explanations on the mode of procedure. The draft warrant was adopted and warrants were directed to be issued for James Gale and Abraham Hammell, the Attorney-General to be notified to attend the examination on the morrow at 10 o'clock.

On Saturday, May 24, the same members were present. Monk, Attorney-General, attended and produced James Hoghtellin, who was sworn and examined. Then Abraham Hammell was brought in before the Committee and informed by the Attorney-General that he stood charged of the murder of Nehemiah Street and had been brought up under the Statute 33, Hy. 8, Ch. 23, "On certain depositions taken before the Magistrates of Niagara from whence he had been sent Prisoner under their warrant to the Gaol at Montreal and . . . removed . . . by Writ of Habeas Corpus under the order and Sign Manual of the Chief Justice"

Hammell's deposition was read, also two depositions by James Hoghtellin and a brief statement of the evidence.

"The Committee then repeated distinctly to the Prisoner, Abraham Hammell, the charge on which he stood accused before them and asked the Prisoner what he has to say in answer thereto, on which he voluntarily made and subscribed the Declaration." He was then remanded to the custody of the Sheriff and a Warrant was issued for James Gale accused of the like crime. When he appeared, the same procedure was gone through with the same result.

On Monday, May 26, Mr. Finlay was employed elsewhere on "pressing and indispensable public business" and the Committee adjourned.

On Wednesday, May 28, Alexr. Henry Thompson was brought in and after the same procedure he was remanded. In his case there had been a Coroner's inquest as well as proceedings before a Magistrate at Niagara. The depositions were read as also the affidavit made by the prisoner in the Court at Montreal in September last, and two affidavits of Edward Meredith and Fras. Child taken before a Magistrate at Montreal in March last.

Instructions were given for warrants for François Nadeau and Eustache Le Comte.

François Nadeau brought in (all proceedings were interpreted to him in French).

He was charged with "Murder of John Ross at the River Arabaska in the distant Northwestern Country, which place the Attorney-General said he was doubtful of being within the ordinary Jurisdiction of the Courts of Justice of the Province and for which felony, therefore, he had brought the Prisoner before the Committee of Privy Council to be examined as a foreign murder under the Statute of 33 Henry 8, ch. 23." Examination had been taken before James McGill, J. P., of Montreal, and the prisoner had been committed to gaol at Montreal and

brought up under a Habeas Corpus issued by the Chief Justice. The same procedure was followed: Nadeau subscribed the voluntary declaration and was remanded.

Eustache Le Compte, also a Canadian, was then brought in: The same procedure and the same result followed.

Judge Mabane gave in a paper in which he said: "Mr. Mabane tho' in compliance with the Letter of His Excellency Lord Dorchester he gave his vote for proceeding to the Examination of the Prisoners and witnesses which the King's Attorney-General should bring before the Committee begs leave to be understood not to have given an opinion that the Statute of the 33d Henry 8th, ch. 23 is in force within the Province in such a manner as to authorize the Governor of it to issue a Commission of Oyer and Terminer for the trial of persons for murder committed without the limits assigned to the Province by His Commission, but only to sending them to England to be tried in such County as it shall please the King to direct."

Then the Committee proceeded to consider whether the prisoners were "vehemently suspected" of felony—all the Council except De St. Ours decided against Hammell and Gale and all but Grant against Nadeau and Le Compte—the Lieutenant-Governor giving no opinion and not voting (Can. Arch. Q. 36, 1, p. 280). Dorchester communicated the facts to Sydney, the Secretary of State for the Home Department, June 9; the Colonies were from 1768 till 1782 in charge of a Secretary of State for the Colonies: from the abolition of that office in 1782 by the Statute 22 George III, c. 82, till July 11, 1794, the Colonies were in charge of the Home Secretary (Haydn's Book of Dignities, pp. 228, 226, is in error as to Sydney's Department—see D. N. B. sub. voc. Townshend, Thomas, Vol. LVII, 131). In his despatch Dorchester said that he would issue a Special Commission of Oyer and Terminer to try those against whom the Council had found, without regard to the scruples of certain Members of the Council, but that in case of a conviction he would grant a reprieve till His Majesty's pleasure should be known (Can. Arch. B. 36, 1, 276). A Special Commission was accordingly issued. The first to be tried was Alexander Henry Thompson for the murder of Isaac Allen near the Post at Niagara. He was convicted before the Chief Justice and sentenced to death. The Chief Justice was not satisfied with the verdict on the evidence adduced and the jury interceded for a pardon, as they were informed and believed that the prisoner had been insane for several years back. Dorchester, October 14, communicated the facts to Sydney and respite the prisoner until instructions should be sent of

His Majesty's pleasure. Dorchester recommended a pardon on condition that the convict should depart from the British dominions (Can. Arch. B. 38, p. 162). October 17, the Governor reported the conviction on that day of James Gale for the murder of Nehemiah Street on September 1, 1787, near the Post at Niagara, and his sentence to death, also that he had respite the execution. He also stated that the chief witness was Abraham Hammell, an accomplice, for whom he recommended a pardon on condition of his leaving the British Dominions. The Chief Justice was firmly convinced of the guilt of Gale and the Governor made no recommendation for mercy to him (Can. Arch. Q. 38, p. 182).

Sydney submitted the matters to the Imperial Law Officers of the Crown, Sir Archibald MacDonald, Attorney-General (afterwards, 1795-1813, Chief Baron of the Exchequer) and Sir John Scott (afterwards Lord Eldon, Lord Chancellor, 1801-1806, 1807-1827). These very great lawyers gave their opinion, Lincoln's Inn, October 6, 1788, that if the offenses were in fact committed without the province, those charged could not be tried within the Province and that there was no authority in the Governor to issue such a Commission of Oyer and Terminer; that Parliament, i. e., the Imperial Parliament, must provide a remedy if one must be provided, and that it was not advisable to send such offenders to England (where the jurisdiction undoubtedly did exist) on the ground of delay, inconvenience and expense (Can. Arch. Q. 38, p. 138). Sydney sent this opinion to Dorchester, White-hall, November 6, 1788 (Can. Arch. Q. 38, p. 137) to guide him in his future course, but said he had not yet consulted his colleagues as to those already convicted.

There was no need for Dorchester to await further instructions; and the prisoners were released.

I can find no other record of any attempt on the part of any Canadian Court to try for a criminal offense committed outside the old Province of Quebec until after the Imperial Act of 1803, 43 George III, c. 138.

But the inhabitants of the territory once undoubtedly within Quebec and while *de jure* belonging to the United States, *de facto* held by Britain had no such immunity. Detroit, Michilimackinac, &c., and their appurtenances continued under the English law and British rule. There is only one record extant of a criminal court of Canada dealing with crime in what is now Michigan, but there can be no kind of doubt of the jurisdiction being constantly exercised by the Courts of Quarter Sessions and the Courts of Oyer and Terminer for the District

of Hesse. The District of Hesse was the most Western of the four Districts into which Lord Dorchester in 1788 divided the territory afterwards Upper Canada. It stretched from the longitude of the extreme end of Long Point, Lake Erie, to the western limit of the Province. In 1792, the name was changed to the Western District.

The record mentioned will be found in the Fourteenth Report of the Bureau of Archives of Ontario (for 1917) pp. 179 sqq. The Court of Oyer and Terminer—what is generally called the “Criminal Assizes,” September 3, 1792, “His Majesty’s Court of Oyer and Terminer, and General Gaol Delivery” opened at L’Assomption (now Sandwich, Ontario) with William Dummer Powell (afterwards Chief Justice of Upper Canada) presiding. Grand Jurymen were called from both sides of the River—the Judge himself resided in Detroit—an inquisition was filed on the death at Michilimackinac of an Indian man, Wawanisse, another respecting Pierre Lalonde, killed at Sagunia (Saginaw), by Louis Roy, another of the murder at Detroit of Pierre Grocher by an Indian man called Guillet—there had been also a murder of David Lynd, alias Jacko, on the River La Tranche (the present Thames) by two Indians. True Bills were found by the Grand Jury against Louis Roy, Guillet and Josiah Cutan of Detroit (for burglary). Roy was acquitted of murder, excusable homicide by misfortune being found. He was remanded to sue out his pardon as the custom was in those days and for long after. Cutan, a colored man, was found guilty of burglary at St. Anne’s and sentenced to death. Guillet was not arrested, nor were the two Indians who slew Jacko.

A Commission, dated January 20, 1791 (still in existence—a copy in my possession; the original is in the Canadian Archives), to Powell and others to hold a Court of Oyer and Terminer and General Gaol Delivery for the District of Hesse directs them to sit in Detroit; and the seat of the Court of Quarter Sessions for the Western District (formerly the District of Hesse) was fixed at Detroit by the Upper Canadian Statute of 1793, 33 George III, c. 6: the same Statute provided for a Court of General Sessions of the Peace in the town of Michilimackinac in July of each year.

A suggestion apparently wholly unauthorized by Simcoe made to the Secretary of State that the people of Detroit should be differentiated from those of the rest of the British territory was met by the Secretary’s firm statement to Simcoe, the Lieutenant-Governor of Upper Canada, “the settlers at Detroit and the other parts are subject to the laws of the Province . . . so long as the Posts are in our possession all persons resident within the same must be considered

to all intents and purposes as British subjects." (Can. Arch. Q. 278, A. p. 24 do, do, Q. 279, 1, 251, letter dated October 2, 1793. See also Can. Arch. Q. 280, 1, p. 106.)

Until the delivery up to the United States in 1796 of these Posts, the Canadian Courts exercised jurisdiction, civil and criminal, over the occupied territory.

The prevalence of crimes of violence in the Far West and the absence of convenient means for their punishment induced the Imperial Parliament in 1804 to pass the well-known Statute 44 George II, c. 138, for the trial of offenses committed in the "Indian Territories or parts of America not within the limits of . . . Lower or Upper Canada or . . . the United States" in the Courts of Lower Canada or if the Governor should think that justice might be more conveniently administered in Upper Canada, then in the Courts of Upper Canada.

Under this legislation a number of persons were tried in the Courts of Lower and Upper Canada for offenses ranging from murder to theft, committed in the Indian Country—these trials are reported in several readily accessible publications and as none of them really bears upon extra territoriality I pass them over here.

The extra territorial power of the Dominion of Canada has been discussed in several cases.

The Criminal Code of 1892 rendered liable to conviction for bigamy any person who being married goes through a form of marriage with another person "in any part of the world," but if the form of marriage is elsewhere than in Canada the person so offending is not to be convicted of bigamy unless he, a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.

The Courts divided in opinion as to the validity of Canadian legislation, making it in Canada a crime to go through a bigamous form of marriage outside of Canada; in the case of the *Queen v. Brierly* (1887) 14 Ontario Reports 525 the Chancery Divisional Court, composed of Sir John Boyd, Chancellor, Mr. Justice Ferguson and Mr. Justice Robertson held the legislation valid; but seven years later, in 1894, the Queen's Bench Divisional Court, composed of Chief Justice Armour and Mr. (afterwards Chief) Justice Falconbridge, held the contrary, in *Queen v. Plowman*, 25 Ontario Reports, 656. The matter was referred to the Supreme Court of Canada and that Court in 1897 decided in favor of the validity of the Statute. In *re Criminal Code*, Sections 275, 276, Chief Justice Sir Henry Strong dissented, but the other Judges, Gwynne, Sedgewick, King and Girouard, JJ., agreed in the

judgment, on the ground that the accused to be convicted must be found to have left Canada with intent to committ offense.

The Judicial Committee of the Privy Council, in 1891, in the case of Macleod v. Attorney-General, N. S. W. (1891), A. C. 455, decided that a Colony cannot convict a person of bigamy who married in another jurisdiction, e. g., the United States; so that while the question of the Lord High Stewart in Earl Russell's Case (1901) A. C. 446, rt. p. 448 "Has not the Imperial Legislature a right to legislate with respect to His Majesty's Subjects all over the world wherever they are?" must be answered in the alternative, the powers of a Colonial Legislature are not so extensive.